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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 342

JEROME HENRY, AS SUPERINTENDENT OF THE INDIANA STATE REFORMATORY,
Petitioner,

vs.

CHARLES O. COTNER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CHARLES O. COTNER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on April 17, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals is as yet unreported. Such opinion of the District Court is unreported. Such opinions are appended hereto (Appendix p. 13).

JURISDICTION

The judgment of the Court of Appeals was made and entered on April 17, 1968. The petition for rehearing was denied on May 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in reversing the District Court and holding that the respondent Cotner had exhausted his state court remedies under 28 U.S.C. § 2254.

a. Whether the respondent Cotner may by-pass the mandates of 28 U.S.C. § 2254, requiring exhaustion of state remedies, by alleging that the sodomy statute, under which he alleges to be unconstitutional, has already been held constitutional by the highest court of Indiana.

b. Whether a motion to vacate the conviction and withdraw the plea of guilty would be available to respondent Cotner in the state trial court thereby constituting an "available State corrective process" under 28 U.S.C. § 2254.

2. Whether the conviction of respondent Cotner for sodomy upon his wife, where the affidavit was signed by his wife, violated his constitutional right to privacy.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Burns IND. STAT. ANN. § 10-4221, provides:

> "Whoever commits the abominable and detestable crime against nature with mankind or beast; or whoever entices, allures, instigates or aids any person under the age of twenty-one (21) years to commit masturbation or self-pollution, shall be deemed guilty of sodomy, and, on conviction, shall be fined not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000), to which may be added imprisonment in the state prison not less than two (2) years nor more than fourteen (14) years."

28 U.S.C. § 2254 provides:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the reme-

dies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Amendment 4 to the Constitution of the United States, provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment 9 to the Constitution of the United States, provides:

"The enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment 14 to the Constitution of the United States, provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

This action was brought in the United States District Court for the Southern District of Indiana on a Petition for Writ of Habeas Corpus for Charles O. Cotner's release from custody, for alleged violations of his federal constitutional rights, against the Superintendent of the Indiana State Reformatory.

The habeas corpus petition was filed on June 7, 1967. The Superintendent of the Reformatory on June 22, 1967, filed a Motion to Dismiss or in the Alternative for Summary Judgment. The District Court on August 25, 1967, entered an order dismissing the petition. (Appendix p. 25). An appeal was perfected by Cotner from that decision. The court of Appeals on April 17, 1968, reversed the decision of the District Court. (Appendix p. 17).

The exhibits that were attached to the habeas corpus petition reveal that Cotner was charged by criminal affidavit with sodomy in the Circuit Court for Jasper County, Indiana, on July 24, 1965. The affiant was Jeane Cotner, wife of the accused. The transcript of the arraignment, also attached as an exhibit, reveals that Cotner entered a plea of guilty to the charge after being fully advised of his rights. The Circuit Court sentenced him to a term of 2-14 years in the Indiana State Reformatory and a fine of $5.00 and costs.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT ON THE EXHAUSTION OF STATE COURT REMEDIES REQUIREMENTS OF THE FEDERAL HABEAS CORPUS STATUTE

Cotner never made an attempt to present his alleged federal questions in this case to the Indiana courts. Instead they were first presented to a federal district court. The District Court held as one of the grounds for dismissing the petition that Cotner had failed to exhaust his state court remedies. The Court of Appeals however reversed the District Court on this point.

The two-fold exhaustion question alone involves issues of such magnitude as to merit review by this Court on the merits.

One of the grounds relied upon by Cotner for not presenting his contentions to the Indiana courts was because allegedly the Supreme Court of Indiana had already passed upon the questions surrounding the constitutionality of Indiana sodomy statute and any presentation would be futile. While it is true that the Supreme Court of Indiana has on two different occasions sustained the statute against charges of vagueness, *Phillips* v. *State*, —Ind.—, 222 N.E.2d 821 (1967) and *Estes* v. *State*, 244 Ind. 691, 195 N.E.2d 471 (1964), it does not mean that it would not be susceptible to more direct argument on the question in a subsequent case or to a charge of unconstitutionality on some other ground, *i.e.*, right to privacy.

This Court has held that constitutional contentions of a habeas corpus petitioner must be presented once to the states courts under 28 U.S.C. § 2254. *Brown* v. *Allen*, 344 U.S. 443 (1953).

The Court of Appeals decision however did not turn on this point but upon the question of whether Cotner could have presented his contentions by way of a motion to vacate the judgment and withdraw his plea of guilty under *Pritchard* v. *State*, 246 Ind. 671, 210 N.E.2d 372 (1965).

The District Court held that the motion to vacate was available to Cotner under *Pritchard*. The Court of Appeals said that the motion must be presented within term time under *Snow* v. *State*, 245 Ind. 423, 199 N.E.2d 469 (1963) and the term at which Cotner's plea was entered has ended.

Judge Duffy however answers this argument in his dissenting opinion by pointing out that the language of the Supreme Court of Indiana in *Koepke* v. *Hill*, 157 Ind. 172, 60 N.E. 1039, 1041 (1901), reflects Indiana's lack of hesitancy to follow decisions of this Court in providing post-conviction means of reviewing federal constitutional questions. Indiana has, particularly since *Lane* v. *Brown*, 372 U.S. 477 (1963), made a good faith effort at providing adequate means by which prisoners can present federal constitutional questions subsequent to conviction and direct appeal. This is borne out when Indiana Supreme Court Rules 2-40 and 2-40A are viewed in light of *Case* v. *Nebraska*, 381 U.S. 336 (1965). Further it must not be forgotten that the States are free to adopt their own measures of post conviction review, if they are constitutionally required to do so at all. *Hysler* v. *Florida*, 315 U.S. 411 (1942). But to inject this receptive attitude, the Indiana Supreme Court must first be given the opportunity of reviewing petitioner's constitutional contentions and this cannot occur if he is not required to present those contentions before the state court.

The language in *Pritchard* indicates that the motion to vacate and withdraw the guilty plea may be made after term time has passed.

> "This court has held on numerous instances, without exception, that when a defendant pleads guilty in a criminal case and a judgment is rendered on the plea, *he cannot properly file a motion for new trial, as there never was a trial,* within the meaning of the statute, and such motion is ineffectual, the proper

remedy being a motion to vacate the judgment and withdraw the plea. [cites omitted].

> "It logically follows that a belated motion for new trial is not an appropriate remedy for errors preceding a judgment rendered on a plea of guilty, since there never was a trial. Rather, under such circumstances the appropriate remedy would be a petition to set aside the judgment and plea of guilty." 246 Ind. 673-674.

The key words in the foregoing language are "would be". The reference is to prospective use of the motion to vacate thereby indicating its availability after term time has passed.

In the final analysis the question is whether Cotner should have attempted to present his constitutional questions by a motion to vacate the judgment and withdraw the guilty plea. The Court of Appeals said no on the grounds that he did not have to speculate on future changes in Indiana law. But should not an applicant first make an attempt to present his position to the courts and even if necessary attempt to change the law? May an applicant by-pass the requirements of 28 U.S.C. § 2254 because the current status of state law may not *appear* favorable to his contentions?

These are important questions which deserve the attention and clarification of this Court.

II.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT, I.E. THE APPLICATION OF THE RIGHT TO PRIVACY DOCTRINE TO THE INDIANA SODOMY STATUTE

The Court of Appeals also erroneously held that the right to privacy doctrine of *Griswold* v. *Connecticut*, 381 U.S. 479

(1965) applies to the Indiana sodomy statute being Burns IND. STAT. ANN. § 10-4221.

Griswold involved a statute making the use of contraceptives unlawful. The majority decision of the Court of Appeals is a far reaching extension of *Griswold* that is unwarranted by the facts of the case at bar.

The Court of Appeals is now suggesting that the crime of sodomy, the establishment of which finds its roots deeply embedded in common law and the constitutionality of which, when committed between other than married persons, would surely not be questioned by this Court, should now provide an exception when the offense is committed between married persons in the privacy of the bedroom. If the views of the Court of Appeals are followed, married persons would be shielded from prosecution of an age old crime while others committing the very same activity would be subject to prosecution. Following this rationale, what other crimes would the constitutional right to privacy make inapplicable to married persons? Where would courts draw the line? Whether a man beats his child, a stranger or his wife, the activity still constitutes the crime of assault and battery. Whether a man shoots his child, a stranger or his wife, the activity still constitutes the crime of murder. Likewise whether a man commits the *crime* of sodomy with his child, a stranger or his wife, the *activity* still constitutes the crime of sodomy. A husband and wife's right to privacy should not shield them from what would otherwise be a criminal act.

Pervading the majority opinion of the Court of Appeals is the idea that force and consent are essential factors in reaching their decision. They concede that only private, *consensual* marital relations are protected under *Griswold* and that the Indiana courts might hold *Griswold* inapplicable upon a showing that the marital relations were ac-

complished by *force.* They further note with apparent significance that Cotner was not charged with using *force,* the statute does not mention *force* and Cotner was not given notice of a defense of *consent.* As Judge Duffy notes in dissent, these theories are unwarranted.

The Indiana court has defined the crime of sodomy as "the abdominable and detestable crime against nature with mankind or beast" which includes both common law sodomy and acts of a beastial character whereby degraded and perverted sexual desires are sought to be gratified contrary to nature. *Murray* v. *State,* 236 Ind. 688, 143 N.E.2d 290 (1957). The crime of sodomy as set forth in the Indiana statute is essentially a codification of the common law crime as outlined in 4 *Blackstone Commentaries* 215.

Since Indiana has adopted the common law crime in essence, we must look to that source to ascertain its elements. At common law, *force* was not an element of the offense and *consent* was no defense. Consent simply made the consenting party an accomplice. *Bishop, Criminal Law* § 1193 (9th ed. 1923); 20 *Am. & Eng. Ency. of Law* 1147 (new ed.); *Russell, Law of Crimes* 977 (7th Eng. ed. & 1st Canadian ed. 1910); 1 *Russell, Crimes and Misdemeanors* 939 (8th ed. 1923); 2 *Wharton, Criminal Law and Procedure* § 754 (1957). In *Bishop, supra,* it is also recognized that sodomy may be committed between married persons. (citing *Reg.* v. *Jellyman,* 8 Car. & P. 604).

Other state supreme courts have reiterated these common law rules when confronted with similar statutes. *Commonwealth* v. *Poindexter,* 133 Ky. 720, 118 S.W. 943 (1909); *People* v. *Elder,* 382 Ill. 388, 47 N.E.2d 694 (1943); *State* v. *Langelier,* 136 Me. 320, 8 A.2d 897 (1939); *State* v. *Pfeiffer,* 277 Mo. 202, 209 S.W. 925 (1918); *State* v. *Weitzel,* 157 Or. 334, 69 P.2d 958 (1937).

Based on the above analysis, the Court of Appeals' emphasis on force and consent is definitely unwarranted and should compel a re-evaluation. Sending the case back to the Indiana courts would be of no avail in light of the above.

There is still another reason why the constitutional right to privacy should not be applicable to this case. Unlike *Griswold*, the prosecuting witness in this case is the defendant's wife. The area of privileged marital communications and testimony is analogous to the marital right to privacy. Exceptions to these privileges have existed since common law to cover any crime committed by one spouse against the other. The exception was ably stated by Judge Learned Hand in *United States* v. *Walker*, 176 F.2d 564, 568 (2nd Cir. 1949):

> "We do not forget that a wife from the earliest times was competent to testify against her husband, when the crime was an offense against her person . . . . The same exception probably extends to the privilege against the admission of confidential communications."

See 2 *Wigmore, Evidence*, § 488, 8 id., §§ 2239, 2240; Uniform Rule of Evidence 28 (2).

Privileged communications between husband and wife is nothing more than a protection of the right to privacy between husband and wife. As the privilege breaks down when a spouse is the injured party, so too should the right to privacy when the spouse is the injured party.

In the final analysis the majority opinion of the Court of Appeals constitutes what that court considers the law should be, as reflected by its reference to the Model Penal Code, rather than what the law is. The question of whether acts of sodomy committed in private by consenting adults should be a crime is a matter for the legislature and not one with any constitutional underpinnings.

CONCLUSION

The Court of Appeals has decided federal questions in a way in conflict with decisions of this Court as well as important questions of constitutional law not heretofore decided by this Court. These constitute sound basis under Rule 19 of this Court to grant a writ of certiorari.

Further, the Court of Appeals' decision has significant impact upon Indiana criminal law. Indiana should therefore be given an opportunity as one of the soverign members of the Union to present its legal position to this Court for review.

WHEREFORE, for the foregoing reasons, petitioner prays that this Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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